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## Basis of Constitutionality of Council of Defense Acts

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BASIS OF CONSTITUTIONALITY OF COUNCIL OF DEFENSE ACTS.—During the recent war unprecedented conditions presented themselves not alone to the fighting forces in the field but to the different departments of federal and state government as well. Resulting therefrom a number of statutes were passed of an emergency nature of which the Council of Defense acts of the several states are a part.<sup>1</sup> Now that the emergency is passed even the courts have begun to weigh and question the source from which the power came which was all-sustaining during the great crisis; some going so far as to declare the acts unconstitutional.<sup>2</sup>

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<sup>1</sup> The West Virginia Act follows in part:

"Section 2. From the time this act becomes effective, and thenceforward until six months after the termination of the present war between the United States and the Imperial German Government, any able bodied male resident of this state between the ages of sixteen and sixty, except bona fide students during school term, who shall fail or refuse to regularly and steadily engage for at least thirty-six hours per week in some lawful and recognized business, profession, occupation or employment, whereby he may contribute to the support of himself and those legally dependent upon him, shall be held to be a vagrant within the meaning and effect of this act, and shall be guilty of a misdemeanor, and upon conviction thereof, shall be fined not more than one hundred dollars for each offense, and as a part of such sentence and punishment . . . shall be by the trial court ordered to work not exceeding sixty days upon the roads or streets, or upon some other public work being done by and in the county in which such person shall be convicted, or by any municipality therein."

Acts of 1917, c. 12

<sup>2</sup> *Ex Parte Hudgins*, 103 S. E. 327 (W. Va. 1920).

In determining the questions presented, most of which are raised under the 13th and 14th Amendments to the Constitution, it will be well to look for a moment at the language of the courts in interpreting the meaning of those prohibitions, leaving out of account the historical evils intended to be cured thereby. The 13th Amendment abolishes slavery and involuntary servitude<sup>3</sup> and the 14th Amendment creates a United States citizenship at the same time prohibiting the states from depriving any person of life, liberty, or property, without due process of law.<sup>4</sup> "The prohibition of slavery, in the thirteenth amendment, is well known to have been adopted with reference to a state of affairs which had existed in certain states of the Union since the foundation of the government, while the addition of the words 'involuntary servitude' were said, in the Slaughter House Cases,<sup>5</sup> to have been intended to cover the system of Mexican peonage and the Chinese coolie trade, the practical operation of which might have been a revival of the institution of slavery under a different and less offensive name. It is clear, however, that the amendment was not intended to introduce any novel doctrine . . ."<sup>6</sup> "The Fourteenth Amendment, in declaring that no State 'shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no

<sup>3</sup> The 13th Amendment reads as follows:

"Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Section 2. Congress shall have power to enforce this article by appropriate legislation."

<sup>4</sup> Section 1, of the 14th Amendment is as follows:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

<sup>5</sup> 16 Wall. 36, 21 L. Ed. 394 (U. S. 1873).

<sup>6</sup> *Robertson v. Baldwin*, 165 U. S. 275, 41 L. Ed. 715 (1897).

greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses. But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having those objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains. Special burdens are often necessary for general benefits—for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects.”<sup>7</sup> “There are certain services which may be commanded of every citizen by his government, and obedience enforced thereto. Among these services are labor on the streets and highways and training in the militia.”<sup>8</sup> It is difficult to see by what stretch of the imagination the work required under the Council of Defense acts comes within the prohibition of these amendments. It cannot be slavery or involuntary servitude within the meaning of the 13th Amendment for those required to labor are not owned as chattels, their labor and services are not demanded for the benefit of others, and they have their full legal rights as to the disposal of their property and services.<sup>9</sup> None of their civil, political, or religious, rights are taken away. It savors of anarchy in times of an emergency to say that there is a natural right of remaining idle, and it should be unnecessary to add that no such right is guaranteed by the 13th and 14th Amendments. Under the Council of Defense acts the only requirement is that able bodied male citizens between certain ages shall be engaged for a certain number of hours each week in some useful and gainful occupation or business during the emergency, the duration of which is determined by the legislatures.

Aside from any question of war power, the state upon which devolves the duty of securing the greatest good for the greatest number, where there is no inhibition, should have and probably does

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<sup>7</sup> *Barbier v. Connolly*, 113 U. S. 27, 28 L. Ed. 923 (1885).

<sup>8</sup> *Horton, C. J., in In re Dassler*, 35 Kan. 673, 12 Pac. 130 (1886).

<sup>9</sup> *Plessy v. Ferguson*, 163 U. S. 537, 41 L. Ed. 256 (1896).

have power to require its citizens to work regardless of an emergency. The practical difficulties of enforcing laws to that effect would be great, which has likely restrained the states from frequent exercise of that power. But as far as the power alone is concerned it resides in the states as a necessary incident to their self preservation.

Another objection to the Council of Defense acts is that they cannot be justified under 'war power' as the grant of that power to the Federal Government deprives the states of its exercise. All writers agree that one of the concomitants of citizenship is the duty owed by each citizen to the state in time of peril of defending that state. Because the power to declare war and to raise and maintain armies was granted to the Federal Government does it not follow that the states thereby rendered themselves impotent to aid the nation in the prosecution of war?<sup>10</sup> It would seem that the grant of such power carries with it the implication that the states must aid in carrying it out when necessary for the preservation of the Federal Government of which they are each a part. As there is a duty of each citizen to defend the state, there is a duty of the individual states to defend the nation, so there must be power in the states over the citizens, otherwise there could be no duty.

It is submitted that the Council of Defense acts do not violate the 13th and 14th Amendments to the Constitution, that whether the power required to enforce same is war power, emergency power, or some other power, it must exist for the preservation of the states, and that it is the province of the legislatures rather than of the courts to determine when its exercise is necessary for the common good.

—Clifford Snider.\*

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**JURISDICTION TO AWARD THE CUSTODY OF A CHILD AFTER DIVORCE.**  
—Two theories as to the basis of jurisdiction to award custody of a child are advanced. One is that the court of the sovereign of the child's domicile shall pass upon the question.<sup>1</sup> The other is

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<sup>10</sup> "Unless the power of the several states to enact legislation beneficial to the federal government while it is at war with a foreign country is expressly prohibited by the constitution or such prohibition is a necessary implication from other powers granted to the federal government or denied to the states, the several states have such power." *Per Curiam, State v. McClure*, 105 Atl. 712 (Del. 1919).

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<sup>1</sup> *Nugent v. Vetzera*, L. R. 2 Eq. 704 (1866); *Wells v. Andrews*, 60 Miss. 373 (1882); *Taylor v. Jeter*, 33 Ga. 195 (1862); *Hammond v. Hammond*, 90 Ga. 527, 16 S. E. 265 (1892); *Baily v. Schrader*, 34 Ind. 260 (1870); *Wilson v. Elliott*, 96